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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 588

CHARLES E. BUNTING, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 27–40) is not reported. The opinion of the Circuit Court of Appeals (R. 127–134) is reported in 164 F. 2d 443.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 24, 1947. (R. 126.) The petition for a writ of certiorari was filed February 12, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Taxpayer's mother created a trust which vested in him complete command over the trust property and income, including the power to revoke the trust at any time and appropriate all the trust funds. Did the court below err in affirming the Tax Court's decision that the trust income was includible in taxpayer's gross income as defined in Section 22 (a) of the Internal Revenue Code and the applicable Revenue Acts?

STATUTES INVOLVED

These appear in the Appendix, *infra,* pp. 12–15.

STATEMENT

The facts found by the Tax Court (R. 28–39) may be summarized as follows:

Taxpayer and his mother in 1924 owned a majority of the shares of stock of Bunting Brass and Bronze Company, the remaining shares being owned by taxpayer's two brothers. On January 18, 1924, taxpayer's mother, for the primary purpose of insuring management of the corporation by taxpayer, transferred her shares in trust to the Toledo Trust Company. Article IV of the trust instrument directed the trustee to dispose of all or any portion of the trust property in accordance with "any written directions" of taxpayer, authorized taxpayer to "withdraw all or any part of said Trust Property by written directions to Trustee", and absolved the trustee of liability

"for anything done in accordance with instructions" of taxpayer. This article further provided that should taxpayer "withdraw all of the Trust Property, this Trust shall thereafter be considered as terminated" unless taxpayer otherwise directed (R. 28–30.)

In order more completely to accomplish the purposes of this trust, taxpayer and his mother decided in 1929 to terminate it and create a new one. (R. 31.) Accordingly, exercising the authority vested in him by Article IV of the 1924 trust instrument, taxpayer on January 2, 1929, addressed a letter to the trustee, signed by himself and his mother, notifying the trustee that he was withdrawing all of the trust property and simultaneously transferring it to his mother, who in turn was simultaneously retransferring the property to the trustee. At the same time, taxpayer's mother executed a new trust instrument conveying to the trustee all of the property theretofore held in the 1924 trust. (R. 31–32.) This second trust is the one whose income is here involved. At the time of its creation in 1929 the trust estate consisted of 2,385 shares of common stock of the Bunting Brass and Bronze Company, about $70,000 worth of miscellaneous securities, and about $4,820 in cash. (R. 38.)

Article II of the 1929 trust instrument provided as follows (R. 32–33):

> Powers of Donor's Son, Charles E. Bunting.

Notwithstanding any other provision herein contained the Donor's son, Charles E. Bunting, may at any time or from time to time during his lifetime (either before or after the death of the Donor), without the consent or approval or joinder of the Donor or of any beneficiary hereof or the consent or approval of any court or other authority, by the delivery of a written order to the Trustee, (a) modify, amend or add to this agreement in any respect whatsoever, including the right to change the beneficiaries hereunder, their shares and the plan of distribution to each and to appoint himself as beneficiary hereof, provided, however, that the duties, powers and liabilities of the Trustee shall not be substantially changed without its prior written consent, (b) withdraw any of the trust property from the operation of this agreement whereupon such property shall be paid and delivered over to the Donor's said son, or (c) revoke this agreement in its entirety, whereupon the entire property then held in trust shall be paid and delivered over to the Donor's said son and this trust shall thereupon terminate; and the Donor's said son shall be under no duty or obligation to account to the Donor or the Trustee or any beneficiary hereunder or to any court or other authority for the application of the trust property so received by him upon the exercise of such power of withdrawal or revocation or by

appointment as such beneficiary, but the same shall be his absolutely.

Article III granted various powers to the trustee, all of which were made "Subject to the control and written directions" of taxpayer. (R. 33–35.) Article IV provided that "In the absence of any direction to the contrary" by taxpayer and "subject in all respects to the exercise of all other powers" conferred upon taxpayer, the net income of the trust was to be accumulated during the joint lives of taxpayer and his mother; that after the mother's death the net income was to be "disposed of in accordance with the written directions" of taxpayer and subject to the exercise by taxpayer of all his other powers; and that after taxpayer's death both principal and accumulated income were to be held subject to the provisions of Article V. (R. 35, 36–37.) Article VII authorized taxpayer to remove the trustee at any time by written notice; in the event of resignation, removal or incapacity of the trustee, taxpayer was authorized to name the successor by a written instrument. (R. 36.)

Exercising some of the powers vested in him by Article II of the 1929 trust instrument, taxpayer on July 12, 1940, struck out the provisions of Article V (relating to distribution of the trust property after his death) and substituted a new one which changed the interests of the beneficiaries. On July 2, 1941, taxpayer again revised the provisions of Article V. (R. 38.)

Taxpayer's mother died in 1938. At no time did taxpayer receive any distribution of income or principal from either the 1924 or 1929 trust, and no distribution of any kind has been made to any person from either of the trusts. (R. 38.)

For the years 1937 through 1941, the taxable years, the trustee filed fiduciary income tax returns in which it reported and paid the tax on the net trust income. (R. 39.) The Commissioner ruled that the income was taxable to taxpayer under Sections 22 (a), 166 and 167 of the applicable Revenue Acts and the Internal Revenue Code, and determined deficiencies accordingly. (R. 14–24, 27.) The Tax Court held that by virtue of the powers vested in taxpayer under the 1929 trust instrument he was the owner of the trust income for purposes of Section 22 (a), and sustained the Commissioner; in view of that holding the Tax Court considered it unnecessary to decide whether taxpayer was alternatively taxable on the income under Sections 166 and 167. (R. 39–40.) The court below agreed with the Tax Court. (R. 127–134.)

ARGUMENT

1. The decision below is in accord with the settled rule that one who has power to revoke a trust and receive either the income or the income-producing principal is taxable on the trust income. It is immaterial that the possessor of the power is someone other than the settlor, and that he did not

exercise the power in his own favor. ***Emery*** v. ***Commissioner,*** 156 F. 2d 728 (C. C. A. 1st), certiorari denied, 329 U. S. 772; ***Mallinckrodt*** v. ***Nunan,*** 146 F. 2d 1 (C. C. A. 8th), certiorari denied, 324 U. S. 871, rehearing denied, 325 U. S. 892; ***Jergens*** v. ***Commissioner,*** 136 F. 2d 497 (C. C. A. 5th), certiorari denied, 320 U. S. 784; ***Richardson*** v. ***Commissioner,*** 121 F. 2d 1 (C. C. A. 2d), certiorari denied, 314 U. S. 684, rehearing denied, 314 U. S. 714; ***Commissioner*** v. ***Newman,*** 159 F. 2d 848 (C. C. A. 2d); see also ***Stix*** v. ***Commissioner,*** 152 F. 2d 562 (C. C. A. 2d); ***Busch*** v. ***Commissioner,*** 148 F. 2d 798 (C. C. A. 8th); ***Frank*** v. ***Commisioner,*** 145 F. 2d 413 (C. C. A. 3d); ***Richardson*** v. ***Commissioner,*** 151 F. 2d 102 (C. C. A. 2d), certiorari denied, 326 U. S. 796.[1] These decisions are rooted in the fundamental principle that taxation is less concerned with refinements of title than with command over property (***Corliss*** v. ***Bowers,*** 281 U. S. 376; ***Helvering*** v. ***Clifford,*** 309 U. S. 331), and the familiar corollary that the power to dispose of income is tanta-

[1] An addition to Treasury Regulations 111, promulgated under the Internal Revenue Code, made by T. D. 5488, 1946-1 Cum. Bull. 19, and consisting of Section 29.22 (a)-22 of the Regulations, expresses the law reflected in these and similar decisions by providing that—

"Where a person other than the grantor of property transferred in trust has a power exercisable solely by himself to vest the corpus or the income therefrom in himself, the income therefrom shall be included in computing the net income of such person. * * *"

mount to ownership of it for tax purposes (*Helvering* v. *Horst,* 311 U. S. 112; *Harrison* v. *Schaffner,* 312 U. S. 579).

The contentions made by taxpayer in the petition for certiorari are essentially the same as those advanced in the petitions for certiorari in the *Emery, Mallinckrodt, Jergens,* and *Richardson* cases, *supra.* Nothing has occurred since the denial of certiorari in those cases which calls for further review of this case.

By virtue of the powers vested in him by Article II of the trust instrument (R. 32–33), taxpayer enjoyed throughout his lifetime complete and unqualified control over both the principal and income of the trust. Indeed, a more absolute command over property and its income could hardly be imagined. At any time during the taxable years taxpayer could have completely rewritten the terms of the trust or modified it "in any respect whatsoever." He could have directed that the entire income be paid to himself, to his creditors, or to any other person; or he could have directed withdrawal and payment to himself of any portion of the principal, including accumulated income; or he could have completely revoked the trust and appropriated the entire trust fund to himself. To exercise any of these choices taxpayer had only to make "delivery of a written order to the Trustee," and he could do so "without the consent or approval or joinder of the

Donor or of any beneficiary hereof or the consent or approval of any court or other authority." He was "under no duty or obligation to account" to any one for application of any of the trust funds he chose to withdraw for himself; they were to be "his absolutely." All that taxpayer lacked was bare legal title, and even this he could secure at will by simply addressing a letter of revocation to the trustee. In the light of the controlling decisions the Tax Court's conclusion (R. 39) that the powers vested in taxpayer "constitute the equivalent of ownership of the trust income for purposes of taxation" is unassailable. As the court below stated (R. 133) in agreeing with the Tax Court, taxpayer had "unfettered command" of the trust income. Certainly the command enjoyed by taxpayer here was no less comprehensive than that possessed by tht taxpayers in the *Emery, Mallinckrodt, Jergens* and *Richardson* cases, *supra.*

2. *Helvering* v. *Horst, supra,* and *Harrison* v. *Schaffner, supra,* relied upon by taxpayer for conflict (Br. 15–17), confirm rather than impugn the correctness of the decision below. The statement of this Court (*Horst,* p. 118; *Schaffner,* p. 580), that "The power to dispose of income is the equivalent of ownership of it" applies with full force here. In those cases the "exercise" of the power to dispose of the income consisted of an affirmative act of assignment by the taxpayer to

others, whereas here (as in the *Emery, Mallinckrodt, Jergens* and *Richardson* cases, *supra*), it consisted of the taxpayer's failure to demand the income for himself; but whether the power of disposition is affirmatively or negatively exercised is of no significance. In support of its decisions in the *Horst* and *Schaffner* cases this Court cited *Corliss* v. *Bowers, supra,* wherein it had stated (p. 378) that the income which one "is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not", and that "it does not matter whether the permission [that another enjoy the income] is given by assent or by failure to express dissent". See also *Emery* v. *Commissioner, supra,* p. 730.[2]

The case of *Helvering* v. *Grinnell,* 294 U. S. 153, relied upon by taxpayer (Br. 15, 17–18), is irrelevant. It involved an estate tax statute which, in its then form, required that property "pass" under the exercise of a general power of appointment to be includible in the estate of the donee of the power.

Commissioner v. *Smith,* 324 U. S. 177, rehearing denied, 324 U. S. 695, also cited by taxpayer

[2] In asserting conflict with the *Horst* and *Schaffner* cases (Br. 15–17) taxpayer apparently confuses the question of *who* is taxable on the income with *when* it is taxable. The trust here involved was taxable to taxpayer because of his unqualified right to demand it (or the income-producing corpus) from the trustee; the income was "realized," and hence taxable, in the respective taxable years it was earned by the trust corpus.

(Br. 15, 18–19), is likewise inapposite. There an employee received compensation in the form of an option to purchase stock at a price higher than its then market value, and exercised the option after the value of the shares had risen above the option price; the question was whether the compensation includible in the employee's gross income was to be measured by the valueless option or included the amount obtained upon later exercise of the option. That question is far removed from the one here presented.

CONCLUSION

The decision below is correct. There is no conflict, and no occasion for further review. The petition should therefore be denied.

Respectfully submitted.

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MARCH 1948.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 22.)

SEC. 161. IMPOSITION OF TAX.

(a) *Application of tax.*—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) *Computation and payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor).

* * * * *

(26 U. S. C. 1940 ed., Sec. 161.)

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

(c) in the case of income received by estates of deceased persons during the

period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary. (26 U. S. C. 1940 ed., Sec. 162.)

SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor. (26 U. S. C. 1940 ed., Sec. 166.)

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition

of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

* * * * *

then such part of the income of the trust shall be included in computing the net income of the grantor. (26 U. S. C. 1940 ed., Sec. 167.)

Sections 22 (a), 161, 162, 166 and 167 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, and of the Revenue Act of 1938, c. 289, 52 Stat. 447, are identical.

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